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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOSEPH JOHN KAPLINSKI, Petitioner.	2 CA-CR 2010-0016-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082464

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes
Tucson
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E S P I N O S A, Presiding Judge.

¶1 Charged with two counts of aggravated assault, petitioner Joseph Kaplinski pled guilty pursuant to a plea agreement to one count of endangerment, a nondangerous, nonrepetitive, class six felony. The trial court sentenced him in December 2008 to a substantially aggravated, two-year prison term. Kaplinski then filed a petition for post-

conviction relief pursuant to Rule 32, Ariz. R. Crim. P., challenging the imposition of his sentence on several grounds. After briefing was complete, the court denied relief without a hearing, and this petition for review followed. We will not disturb a trial court's ruling on a petition for post-conviction relief unless we find it has clearly abused its discretion. *State v. McCall*, 160 Ariz. 119, 129, 770 P.2d 1165, 1175 (1989).

¶2 The statute under which Kaplinski was sentenced was former A.R.S. § 13-702.01(A).[1] When he committed the endangerment offense on May 3, 2008, § 13-702.01(A)(5) specified that the substantially aggravated sentence for a class six felony was a maximum of two years, which § 13-702.01(A) permitted the trier of fact to impose if it found "beyond a reasonable doubt . . . at least two aggravating factors listed in [A.R.S. §] 13-702[(C)]." 2006 Ariz. Sess. Laws, ch. 148, § 2. In his plea agreement, however, Kaplinski had agreed that "the Court, using a standard of preponderance of the evidence, may find the existence of aggravating or mitigating factors which [could affect his] sentence or disposition." Further, he agreed that "the rules of evidence do not apply in the determination of aggravating and mitigating factors."

¶3 In his petition for post-conviction relief, Kaplinski asked the court to vacate his sentence on the following four grounds: first, that it was not supported by two statutorily enumerated aggravating factors as required by § 13-702.01(A); *State v.*

[1]Significant portions of Arizona's criminal sentencing code have been renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after December 31, 2008." *Id.* § 120. As part of those comprehensive changes, § 13-702.01 was repealed, *id.* § 25, and its substantive provisions were modified and moved to become parts of A.R.S. §§ 13-702 and 13-703. In this decision, we refer to the statutes in effect when Kaplinski committed this offense on May 3, 2008.

Schmidt, 220 Ariz. 563, 208 P.3d 214 (2009); and *State v. Perrin*, 222 Ariz. 375, 214 P.3d 1016 (App. 2009); second, that the trial court had failed to provide advance notice, as required by § 13-702.01(I), of its "intent" to impose a substantially aggravated sentence; third, that his trial counsel had rendered ineffective assistance by not objecting to the court's failure to provide the required notice; and, fourth, that the court had improperly "enhanced" his sentences without prior notice because his plea agreement did not include a citation or other reference to § 13-702.01. Dismissing Kaplinski's petition in a written minute entry, the trial court discussed each issue Kaplinski had raised and ultimately found each meritless. On review, Kaplinski challenges the trial court's rulings on each of those four issues, which we discuss in turn.

Enumerated Aggravating Factors under Former § 13-702(C)

¶4 First, Kaplinski reiterates his contention that his substantially aggravated sentence was not supported by two statutorily enumerated aggravating factors. As the recent decisions in *Schmidt* and *Perrin* have made clear beyond any debate, of the aggravating circumstances used to support imposition of a substantially aggravated sentence under § 13-702.01, at least two must be found among the aggravators specifically listed in former § 13-702(C)(1) through (22).[2] *See* 2006 Ariz. Sess. Laws, ch. 148, § 1. They may not fall under the general "catch-all" provision of § 13-702(C)(23) ("[a]ny other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime"). As our supreme

[2]We likewise refer to the version of § 13-702 in effect when Kaplinski committed this offense in May 2008. *See* 2006 Ariz. Sess. Laws, ch. 148, § 1.

court stated in *Schmidt*, "[t]he catch-all provision is patently vague," and relying on it alone to "increase a defendant's statutory maximum sentence violates due process." 220 Ariz. 563, ¶¶ 9-10, 208 P.3d at 217; *see also Perrin*, 222 Ariz. 375, ¶ 9, 214 P.3d at 1019 (sentence imposed under § 13-702.01(A) must be supported by minimum of two clearly enumerated aggravators).

¶5 Here, the four aggravating factors cited by the court as "outweigh[ing] all mitigating factors" were these: Kaplinski's "prior felony history, the emotional and physical harm to the victim, [Kaplinski's] lack of remorse [or] acceptance of responsibility, and the Court's belief that [he is] a danger to the community and a danger to any law enforcement officer . . . required to supervise [him] on probation." The parties agree that, of these, harm to the victim is an aggravating circumstance clearly enumerated in § 13-702(C)(9) ("The victim . . . suffered physical, emotional or financial harm."). There is likewise no dispute that two other factors—Kaplinski's failure to accept responsibility for his actions or to demonstrate remorse, and his danger to the community—both fall within the catch-all provision of § 13-702(C)(23).

¶6 At issue, then, is whether the trial court also sufficiently found, as a second statutorily enumerated aggravator, that Kaplinski had been "previously convicted of a felony within the ten years immediately preceding the date of the offense." § 13-702(C)(11). Because the court failed to identify the precise conviction or convictions on which it was relying, our inquiry is twofold; we must determine, first, whether Kaplinski had actually been convicted of a previous felony in the ten years before May 3, 2008,

and, if so, whether the court made a sufficiently specific finding of that aggravating circumstance.

¶7 The presentence report filed in the trial court on December 19, 2008, to which Kaplinski has offered no objection, reflects he had been convicted in Pima County in February 2006 of three counts of attempted flight from a law enforcement vehicle.[3] From this we conclude he did in fact have at least one qualifying prior felony conviction within the preceding ten years. Kaplinski has not affirmatively denied the fact of that prior conviction[4] but, rather, asserts the court failed to make "a specific finding that a

[3]As the predicate for seeking an enhanced sentence, the state had filed a separate allegation of this prior conviction at the same time the indictment was filed.

The presentence report contains this paragraph:

> • CR-20054041, Counts One, Two and Three, Attempted Fleeing From Law Enforcement Vehicle, all Undesignated Offenses: On February 13, 2006, the defendant was placed on one year unsupervised probation, to be served concurrently with a federal probation grant. On October 3, 2006, a Petition to Revoke Probation was filed. On October 23, 2006, the defendant was reinstated on probation. On September 11, 2007, he was discharged from probation, but his offenses remain undesignated.

[4]Although Kaplinski has not denied the existence of the 2006 Pima County conviction, he asserts "his only prior conviction was a foreign felony" from federal court, which could not support a finding under § 13-702(C)(11) unless the state first "prove[d] that the offense would have also been a felony under Arizona law, which it did not do." Despite characterizing his federal conviction as his "only prior conviction," nowhere has Kaplinski expressly denied, discussed, or even mentioned the presentence report's statement that he was convicted in 2006 of three counts of attempted flight from a law enforcement vehicle in CR-20054041. As quoted in the preceding footnote, the presentence report states that those offenses remained "undesignated" after Kaplinski's discharge from probation in September 2007. Pursuant to former § 13-702(G), an

prior felony conviction was proven" and instead relied on his "criminal history" as an aggravating factor.

¶8 In pronouncing sentence, the trial court first stated:

> So I had to consider whether or not with your *prior felony convictions*, the emotional and physical harm to this victim, the difficulty you even had admitt[ing] you did anything wrong at the plea, whether [you] had any remorse or acceptance of responsibility other than you entered into a plea, and I just couldn't find it.

(Emphasis added.) The court then stated in these slightly different words the specific aggravating factors it found:

> The aggravating factors in this case that outweigh mitigating factors are your *prior felony history*, the emotional and physical harm to the victim, your lack of remorse [or] acceptance of responsibility, and the Court's belief that you are a danger to the community and . . . to any law enforcement officer . . . required to supervise you on probation.

(Emphasis added.)[5]

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undesignated, class six felony offense "shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor." Therefore, if Kaplinski either assumes or suggests that the undesignated offenses underlying his Pima County conviction in CR-20054041 were misdemeanors rather than felonies, the available record does not support such a view.

[5]Although the sentencing minute entry repeats neither of the court's two oral formulations, citing instead Kaplinski's "prior criminal history" as the aggravating circumstance, generally a court's oral pronouncement of sentence controls over the written minute entry in the event of a conflict. *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989) ("Oral pronouncement in open court controls over the minute entry."); *see also State v. Zinsmeyer*, 222 Ariz. 612, ¶ 23, 218 P.3d 1069, 1079 (App. 2009) (holding defendant's sentence improperly aggravated based on prior felony

¶9 In response to Kaplinski's post-conviction claim that the trial court had improperly relied only on his "criminal history"—a catch-all factor—rather than on a specific prior felony conviction, the state asserted that the sentencing court had properly found Kaplinski had "prior felony convictions" under § 13-702(C)(11). Presumably agreeing with the state, the court then dismissed Kaplinski's claim in the following pertinent passages of its ruling:

> On December 19, 2008, the Court sentenced the defendant to the substantially aggravated term of two years based on four aggravating factors – *prior criminal history*, emotional and physical harm to the victim, lack of remorse and failure to take responsibility, and danger to the community and law enforcement . . . .
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> . . . .
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> A) The Court based its imposition of the substantially aggravated sentence on the defendant's *criminal history*, the emotional and physical harm to the victim, the defendant's lack of remorse and failure to take responsibility, and the danger he posed to law enforcement and the community. A.R.S. § 13-702(C) lists physical and emotional harm to the victim and prior felony convictions as the ninth and eleventh enumerated aggravating factors, respectively. The defendant argues in his reply that the prior felony conviction was not proven and therefore must fall under the catch-all provision. Defendant waived his right to a jury determination of aggravating or mitigating factors in the plea agreement.

(Emphasis added.)

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conviction that was listed in sentencing minute entry but not cited in court's oral pronouncement of sentence).

¶10 Despite some apparent conflation in the minute entry of the distinct terms "criminal history" and "prior felony conviction," we nonetheless conclude from the entirety of the record that the trial court did find Kaplinski had a qualifying prior felony conviction for purposes of § 13-702(C)(11) and relied on that conviction as the second enumerated aggravating factor necessary to permit its imposition of a substantially aggravated sentence. *See generally State v. Burdick*, 211 Ariz. 583, ¶¶ 11, 13, 125 P.3d 1039, 1041 (App. 2005) (holding trial court's finding as aggravating factor defendant's "'[c]riminal history with multiple misdemeanor and felony convictions with multiple incarcerations and probation'" a sufficient "finding of prior convictions" to satisfy *Blakely v. Washington*, 542 U.S. 296 (2004)).

¶11 In his petition for review, Kaplinski has failed to demonstrate the trial court clearly abused its discretion in denying post-conviction relief. In support of his assertion that "the state did not prove a prior felony conviction for the court to use as an aggravating factor," he cites *State v. Pandeli*, 215 Ariz. 514, ¶ 12, 161 P.3d 557, 565 (2007), for the proposition that "'[t]he proper procedure to establish [a] prior conviction is for the state to offer in evidence a certified copy of the conviction . . . and establish the defendant as the person to whom the document refers.'" *Id.*, *quoting State v. Lee*, 114 Ariz. 101, 105, 559 P.2d 657, 661 (1976). *Pandeli*, however, was a capital murder case, in which a jury determined Pandeli should be sentenced to death after it found the state had proven two aggravating circumstances under former A.R.S. § 13-703(F), including

that Pandeli had been "'previously convicted of a serious offense'" for purposes of § 13-703(F)(2).[6] 215 Ariz. 514, ¶ 4, 161 P.3d at 563-64.

¶12 *Pandeli* is both factually and legally distinguishable from this case. In *Pandeli,* our supreme court specified the procedure necessary to prove to a jury beyond a reasonable doubt that a defendant convicted of murder has previously been convicted of a serious offense. *See* former § 13-703(B), (F)(2); 2005 Ariz. Sess. Laws, ch. 325, § 2. This is not the same procedure required to prove that a pleading defendant has previously been convicted of a felony, when that defendant in his plea agreement has expressly waived his right to "all trials" and agreed that the court could find the existence of any aggravating or mitigating factors based on a preponderance of the evidence and without applying the rules of evidence.

¶13 Kaplinski has cited no case holding or even suggesting, on comparable facts, that unchallenged information in a presentence report cannot supply sufficient evidence to establish by a preponderance that a pleading defendant like Kaplinski has previously been convicted of a felony. *See State v. Watton*, 164 Ariz. 323, 327, 793 P.2d 80, 84 (1990) (noting "primary source of information at sentencing usually is the presentence report" and holding defendant has duty to challenge "unreliable or inaccurate" information in report); *State v. Marquez*, 127 Ariz. 3, 6, 617 P.2d 787, 790 (App. 1980) (finding no abuse of discretion in court's consideration of presentence report

[6]Section 13-703 was renumbered as A.R.S. § 13-751 and amended by 2008 Ariz. Sess. Laws, ch. 301, §§ 26, 38, effective January 1, 2009.

information obtained from law enforcement records; defendant waived any challenge to information by failing to object); *cf. State v. Shuler*, 162 Ariz. 19, 22-23, 780 P.2d 1067, 1070-71 (App. 1989) (illustrating court's reliance on information in presentence report detailing defendant's history of arrests and convictions). In short, Kaplinski has failed to establish either that his substantially aggravated sentence was improperly imposed for lack of a second statutorily enumerated aggravating factor or that the court abused its discretion in denying post-conviction relief on that ground.

Lack of Notice Required by § 13-702.01(I)

¶14 Former § 13-702.01(I) provided:

> The court shall inform all of the parties before sentencing occurs of its intent to increase or decrease a sentence pursuant to this section. If the court fails to inform the parties, a party waives its right to be informed unless the party timely objects at the time of sentencing.

2006 Ariz. Sess. Laws, ch. 148, § 2. Kaplinski contended below, as he does here, that the court's failure to inform him in advance of its intent to impose the substantially aggravated term means that his sentence was not imposed in accordance with law for purposes of Rule 32.1(c) and that he is entitled to be resentenced.

¶15 The trial court acknowledged it had failed to provide the required notice but further found Kaplinski had "waived his right to be informed of the Court's intention when he failed to timely object to the imposition of the substantially aggravated term." Kaplinski concedes he did not object below and thus waived his right to be informed as

provided by § 13-702.01(I). The trial court did not abuse its discretion in finding this particular claim devoid of merit.

Ineffective Assistance of Counsel

¶16 Kaplinski next asserts trial counsel was ineffective for not objecting to the trial court's failure to give the notice required by § 13-702.01(I) of its intent to impose a substantially aggravated sentence. A successful claim of ineffective assistance of counsel requires proof that counsel's performance was deficient as defined by the prevailing professional norms, and this deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Establishing prejudice requires a showing that, but for the ineffectiveness of counsel, the outcome of the trial or the sentence imposed would have been different. *State v. Carver*, 160 Ariz. 167, 174, 771 P.2d 1382, 1389 (1989). "If no prejudice is shown, the court need not inquire into counsel's performance." *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992).

¶17 Here, Kaplinski has failed to show he was prejudiced. He contends that, had defense counsel objected, the trial court "would have been obligated to either impose a sentence of 1.5 years or less or to recalendar the sentencing hearing to give both counsel time to prepare evidence and arguments against such a sentence." However, because the court imposed the substantially aggravated, two-year sentence despite the state's recommendation of only an aggravated, 1.5-year term, it appears highly likely the court would have postponed Kaplinski's sentencing if necessary, rather than acquiescing to the 1.5-year term. Moreover, Kaplinski has not explained what additional mitigating

evidence he would then have been able to present that likely would have persuaded the court to impose a shorter sentence than the term it imposed. His claim of prejudice, therefore, is purely speculative, and he has failed to show any substantial likelihood that a timely objection to the lack of notice or even a postponement of his sentencing hearing would have resulted in a lesser sentence. The court thus did not abuse its discretion in finding Kaplinski had failed to allege the prejudice necessary to raise a colorable claim of ineffective assistance of counsel.

Improper Enhancement

¶18 Finally, Kaplinski asserted below that his sentence had been improperly "enhanced" without proper notice, apparently because his plea agreement did not contain a specific citation to § 13-702.01. The trial court explained its denial of relief on this claim as follows:

> The sentence ultimately imposed was the substantially aggravated sentence available under A.R.S. § 13-702.01(A), not the enhanced sentence available under A.R.S. § 13-604. In addition, the defendant was on notice regarding the full and applicable sentencing range at the time he entered the plea. While A.R.S. § 13-702.01 was not cited in the plea agreement, the range was set out clearly in the text of the plea and this Court reviewed that range with the defendant on the record before his guilty plea was accepted.

We note, in addition, that § 13-702.01 had been alleged in the indictment and that its omission from the amended charge in the plea agreement seems an obvious clerical error, as the amended count alleges "§ 13-702" twice in succession. In any event, because Kaplinski's sentence was not enhanced but aggravated and because his plea agreement

correctly set forth the applicable sentencing range, we find no abuse of discretion in the trial court's ruling.

¶19 Accordingly, although we grant the petition for review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge